

3-2000-5669-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration  
of the Cross-Section of Wetland  
Basin 65-4W, by Dennis Albertson  
and Todd Reck, Without a Permit  
from the Commissioner of Natural  
Resources.

FINDINGS\_OF\_FACT,  
CONCLUSIONS\_AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on July 17, 1991 at 10:00 a.m. in the Buffalo Lake Community Center Auditorium, Buffalo Lake, Minnesota.

Appearing on behalf of the Minnesota Department of Natural Resources (hereinafter "DNR" or "the Department") was Donald A. Kannas, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55101.

Appearing on behalf of Todd Reck was Curtis L. Reese, Selander and Reese, Attorneys at Law, 207 South 8th Street, P.O. Box 56, Olivia, Minnesota 56277.

The record in this proceeding closed upon receipt of correspondence on October 18, 1991.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Rodney Sando, Commissioner, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4001, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Whether Todd Reck and Dennis Albertson have altered the cross-section of Unnamed Wetland 65-4W without a permit issued by the Commissioner of Natural Resources, and if so, whether Mr. Reck and Mr. Albertson should be required to

remove the drainage tiles and restore the area to its former condition.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Unnamed Wetland 65-4W is located in the southwest quarter of Section 22 and in the northwest quarter of section 27, Preston Lake Township (Township, 115 North, Range 31W) Renville County, Minnesota. Unnamed Wetland 65-4W is an hourglass shaped wetland consisting of two water basins separated by a field crossing at the approximate center of the hourglass, separating the basins, north and south. North of the field crossing is the "north sub-basin" and the "south sub-basin" is south of the field crossing. The south sub-basin is entirely within the Northwest Quarter of Section 27.

2. Before 1981, Unnamed Wetland 65-4W consisted of approximately 83-85 acres; on the date of the hearing the Wetland was diminished to approximately 60 acres. The loss of wetlands have occurred in the south sub-basin.

3. During the early 1980s, the Northwest Quarter of Section 27 (hereinafter the "NW Quarter") was owned and farmed by Mr. Dennis Albertson. Mr. Albertson installed tile that partially drained the south sub-basin and planted crops in the partially drained area in 1981. The partially drained area has been cultivated since 1981.

4. Mr. Todd Reck began farming the NW Quarter in 1986, at which time he was renting the property on a cash basis from Travelers Insurance Company. He has planted a crop in the south sub-basin each year since 1986.

5. When the NW Qua

6. The DNR also desired to purchase the NW Quarter, having previously determined that it was suitable for wildlife habitat. The DNR had been an unsuccessful bidder on the property.

7. On February 22, 1990 Mr. Schultz and Mr. Reck met at the site. Field observations of the property showed substantial drainage tile had been installed in the south sub-basin. Mr. Reck was aware that drainage tiling had been done by the previous owner, Mr. Dennis Albertson. Mr. Reck wanted to know what his rights were with respect to the use of the property. Mr. Reck also wanted to know if he could further tile the area if he did not get adequate drainage in the south sub-basin of the Wetland. Mr. Schultz suggested that the DNR Area Hydrologist, Mr. James F. Sehl, be consulted on the drainage question.

Five days later on February 27, 1990, Mr. Sehl joined Schultz and Reck for a field investigation of the drainage in the water basin. After a field

investigation of the property, Mr. Reck was told that he was free to plant crops any place in the water basin during dry periods when he was able to get his equipment into the area. However, the placement of any further drainage tile lines in the water basin was illegal and would require the issuance of a permit by the Commissioner of Natural Resources. Mr. Reck was also told that a DNR survey crew would return to the property to ascertain the exact boundaries of the water basin and the DNR would determine at a later date what would be done with the illegally installed tile lines. Mr. Reck was also told he should contact the DNR before any further tiling.

8. The DNR became aware of the tiling in the south sub-basin for the first time in February 1990, when Mr. Sehl and Mr. Schultz made field observations of the south sub-basin.

9. After the meetings with Mr. Sehl and Mr. Schultz, Mr. Reck decided to go ahead and exercise his option to purchase the NW Quarter in 1990.

10. On August 6, 1990 when Mr. Schultz returned from a vacation he retrieved a message from his answering machine that suggested that Mr. Reck was installing tile lines in the south sub-basin. On the following day, August 7, 1990, Mr. Schultz visited the Wetland to check out the report. After arriving at the Wetland he saw a tile contractor leave the field. When walking across the field he saw numerous areas where tile had just been laid. Mr. Reck and/or his agents had laid several new tile lines and three surface water intake pipes. As he was leaving he met Mr. Reck who was at that time driving a tractor with a disc attachment. He at that time informed Mr. Reck that the new tiling was illegal and unauthorized and that he would contact him later about the matter. Mr. Reck proceeded to disc the area where the tile lines had been laid making identification of the tile lines difficult.

11. An aerial photograph taken in 1983 shows the drainage activity of Mr. Albertson. Subsurface drainage tile lines have been laid in the south sub-basin of Unnamed Wetland 65-4W. Ex. 8. Approximately 20 acres have been tiled. The photo shows six drainage tile lines have been laid generally east-west (horizontal) and approximately two drainage tile lines have been installed generally north-south (vertical) connecting with a drainage ditch that runs along the road that divides the northern and southern parts of Section 27. Ex. 8.

12. An aerial photograph taken in approximately early August 1990 shows that a crop that had been planted in the south sub-basin of Unnamed Wetland 65-4W was drowned out because of excess surface water. Ex. 7. This photo establishes that the tiling that had been done by Mr. Albertson was inadequate to completely drain the south sub-basin during wet periods. The area that

appears lighter than the surrounding area is cultivated land on which the crops that were planted died because of having been drowned out. Ex. 7.

13. Exhibits 10 and 11 are photographs taken of Unnamed Wet

14. Exhibit 13 depicts where the landside edge of the aquatic vegetation would be without the installation of drainage tiles by Mr. Albertson and Mr. Reck. The landside edge of the aquatic vegetation would extend to the high point on the southern side of the basin as demonstrated by "the high point in swell" contained in Exhibits 13 and 14.

15. Aerial photographs of Wetland 65-4W taken in 1967, 1977 and 1980, before the installation of drainage tiles in the south sub-basin, show the hourglass shape of the Wetland. The landside edge of the Wetland as demonstrated by the irregular pattern of the aquatic vegetation extends further to the south near the southern edge of the northwest quarter of Section 27. Ex. 13, Ex. 9, Ex. 16. Aerial photographs of the water basin taken after the tiling by Mr. Albertson and Mr. Reck show that the landside edge of the aquatic vegetation has retreated to the north. Ex. 10, Ex. 11.

16. As a result of Mr. Reck and Mr. Albertson's tiling activities, approximately 20-23 acres of Unnamed Wetland 65-4W have been drained. The newly cultivated acreage is consistent with tax assessments for the property which show an assessment on 100 acres prior to 1981 and an assessment on 120 acres after Mr. Albertson's initial tiling in 1981.

17. On September 19 and October 17, 1990, DNR survey crews conducted a hydrographic survey of Wetland 65-4W. They determined that the ordinary high water level (OHWL) of the south sub-basin is 1058.1 feet, N.G.V.D. 1929. Ex. 14, Ex. 20.

18. A cross-section of the south sub-basin depicted in Exhibit 14 is based on DNR's hydrographic survey. Exhibit 14 shows that the south sub-basin is a basin capable of holding water. It has a natural depression-bottom elevation of 1057.1 to 1057.2. It has definable banks -- "Top Crossing" on the north side (1058.7) and "High Point in Swale" on the south side (1058.9).

19. The bottom (bed of the water basin) of the south sub-basin is 1056.2 - 1057.1, N.G.V.D. Ex. 14, Ex. 20. The tile lines and surface water intake pipes installed by Mr. Reck were installed at varying depths between 1056.20 and 1056.54. The surface water intake pipes and the tile lines are below both the OHWL and also below the bottom of the south sub-basin.

20. The parties stipulate that Unnamed Wetland 65-4W has been officially and appropriately designated a protected public water pursuant to Minn. Stat. §103G.201 (1990).

21. Mr. Sehl discussed with Mr. Reck the DNR's water bank program. Mr.

Reck was offered an opportunity to participate in the program wherein the DNR would compensate him for not draining the Wetland, basically leaving it intact as a water basin. In the Fall of 1990, Mr. Reck was offered an opportunity to participate in the water bank program. At that time he indicated that he was not interested.

22. On June 7, 1991 Ronald M. Nargang, Deputy Commissioner of Natural Resources, issued an Order and Notice of Hearing setting this matter for hearing on July 17, 1991 at the Buffalo Lake Community Center Auditorium in Buffalo Lake, Minnesota.

23. On June 11, 1991, the Order and Notice of Hearing were served upon Mr. Reck and his attorney, as well as other federal, state and local officials.

Ex. 2.

24. Mr. Dennis Albertson's name does not appear on the service list for the Order and Notice of Hearing; therefore, the record does not establish that he was served with the documents initiating this proceeding.

25. A copy of the Order and Notice of Hearing was published in the Renville County State Farmer News for two successive weeks, June 19 and June 26, 1991. Ex. 3. The Order and Notice of Hearing was also published in the EQB Monitor, Volume 15, No. 23, June 24, 1991.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. All relevant substantive and procedural req
2. The south sub-basin of Unnamed Wetland 65-4W is a "waterbasin" (capable of holding water) as that term is defined in Minn. Stat. § 103G.005, subd. 16 (1990).
3. Unnamed Wetland 65-4W has been properly designated a protected "public water" pursuant to the Public Waters Inventory and Classification procedures. Minn. Stat. § 103G.201 (1990).
4. Because it is a public water, Unnamed Wetland 65-4W may not be drained unless a permit authorizing drainage is issued by the Commissioner. Minn. Stat. § 103G.211 and § 103G.221, subd. 1 (1990).
5. The Department has the burden of proving by a preponderance of the evidence that Mr. Reck and Mr. Albertson have engaged in conduct or activities affecting Wetland 65-4W that require the issuance of a permit by the Commissioner.
6. The Department has proved by a preponderance of the evidence that Mr. Albertson and Mr. Reck installed drainage equipment below the ordinary high water level in the south sub-basin of Wetland 65-4W that has resulted in the

drainage of the public water. Mr. Reck and Mr. Albertson have altered the cross-section of Unnamed Wetland 65-4W without a permit issued by the Commissioner.

7. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner issue an order requiring that Todd Reck remove the drainage equipment he installed in the bed of the south sub-basin of Unnamed Wetland 65-4W and restore the Wetland to the condition that it was in previous to his drainage activities.

Dated this \_\_18th\_\_ day of November, 1991.

s/Allen E. Giles\_\_\_\_\_

ALLEN E. GILES  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded. Four Cassettes.  
Nos. 10,581, 10,582, 10,583, and 10,550.

#### MEMORANDUM

The parties stipulate that Unnamed Wetland 65-4W has been legally and properly designated as a protected public water pursuant to the Public Waters Inventory and Classification Procedures of Minn. Stat. § 103G.201 (1990). As a protected public water properly inventoried pursuant to Minn. Stat. § 103G.201 (1990), drainage of Wetland 65-4W is prohibited pursuant to Minn. Stat. § 103G.211 and § 103G.221 (1990).

Mr. Reck asserts that although he installed the drainage tiles and pipes, they were not installed within the boundary of Wetland 65-4W. There is no

dispute in this proceeding that drainage tile and pipes have been installed by

Mr. Albertson and Mr. Reck, albeit Mr. Reck asserts that he installed fewer tiles than the number identified by Exhibit 13. The first question presented by this proceeding is whether the tiles installed by Mr. Albertson and Mr. Reck

were installed within the boundary of the protected public water. A wetland's

boundaries are delineated by its Ordinary High Water Level. Minn. Stat. § 103G.005, subd. 14 defines ordinary high water level (OHWL) as the boundary of wetlands and

(1) The ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial; . . .

A wetland's boundary is tha

Minnesota. His testimony was based on field inspections and review of aerial photographs of the Wetland. During his field inspection he found surface water

intake pipes and tile lines installed in the bed of the basin. Based on his examination of aerial photos taken in 1977, 1967 and 1980, he concluded that, before the drainage activities by Mr. Albertson and Mr. Reck, the landside edge

of the south sub-basin extended much further south as shown in Exhibit 13.

In

Exhibit 13 he depicted the previous landside edge of the aquatic vegetation of

the south sub-basin as being at or near the "high point in swell" along the south end of the NW Quarter. Mr. Sehl estimated that approximately 20 acres of

the Wetland have been drained as a result of the drainage activity. The DNR's

other witness on the issue of the boundary of the south sub-basin was John M. Scherek, survey crew supervisor for the DNR. Mr. Scherek headed up the survey

crew that investigated the ordinary high water level of Wetland 65-4W. The results of that investigation are contained in Exhibit 20 and depicted on Exhibit 14. He testified that the Ordinary High Water Level and the bed of the

south sub-basin are 1058.1 and 1056.2 - 1057.1, respectively. The drainage tiles and surface water intake pipes installed by Mr. Reck are below both the OHWL and the bed of the south sub-basin. He testified that because of the pipes and the tiling area, approximately 20 acres have been drained.

Mr. Reck sponsored no testimony that contradicted the testimony of Mr. Sehl and Mr. Scherek. The only testimony offered by Mr. Reck regarding the boundary of the south sub-basin was his testimony that the area being identified as Wetland had been used as crop land for approximately 10 years since 1981. This testimony does not diminish or otherwise challenge the testimony of Mr. Sehl and Mr. Scherek regarding the boundary of the south sub-basin. It should also be noted that Minn. Stat. § 103G.215 (1990), authorizes the use of wetlands for cultivation of crops during drought

conditions when the land is dry enough to get farm equipment on it to plant crops. Therefore, using a wetland as crop land is not inconsistent with laws protecting public waters. However, wetlands can be farmed in this way only during drought periods when the land is dry naturally and not as a result of the installation of drainage tiles. Assuming Mr. Reck has been able to crop the wetland each year since 1986, he in part has been able to do this because of the placement of drainage tiles in the water basin.

The other major argument raised by Mr. Reck is that "the DNR should not be allowed to require the removal of tile on the Reck farm due to the DNR's conduct in this entire matter." Mr. Reck argues that the DNR engaged in misconduct or made representations to Mr. Reck that Mr. Reck relied on to his detriment, therefore the doctrine of equitable estoppel should bar the DNR from requiring restoration of the Wetland. To establish a claim of estoppel, Mr. Reck must prove that the DNR made representations or inducements, upon which he reasonably relied and that he will be harmed if the claim of estoppel is not allowed. Brown\_v.\_Minnesota\_Department\_of\_Public\_Welfare, 368 N.W.2d 906, 910 (Minn. 1985).

Mr. Reck asserts that the DNR knew of the drainage activities undertaken by Mr. Albertson in the south sub-basin in 1981, but has failed over a 10-year period to require removal of the drainage tile. The uncontradicted testimony in this proceeding establishes that the DNR had no previous knowledge of drainage activities in the south sub-basin by Mr. Albertson in 1981. The DNR learned of these activities for the first time in February, 1990. Under the circumstances, DNR has not sat on its hands as Mr. Reck argues. Mr. Reck may be confused by other illegal drainage activities by Mr. Albertson in the north sub-basin in 1980. The DNR knew of the illegal drainage in the north sub-basin which Mr. Albertson agreed to remove. See

Next, Mr. Reck argues that the DNR representatives, Mr. Sehl and Mr. Schultz, made representations to him that he could further tile the south sub-basin of the Wetland. Mr. Reck argues that he relied on the representations to his detriment. These assertions are contrary to the testimony of Messrs. Sehl and Schultz at the hearing. They informed Mr. Reck that the tile lines placed in the south sub-basin had been illegally installed, advised Mr. Reck on how he could use the land, and required that he contact DNR before any further drainage activity.

Based on the foregoing, Mr. Reck has failed to prove that the DNR has engaged in any misconduct or made representations that he could engage in further drainage activities in the south sub-basin. Equitable estoppel is not appropriate in this proceeding.

This record fails to establish that Mr. Albertson has been properly served with the Order and Notice of Hearing. Mr. Albertson did not appear or



otherwise participate in the contested case proceeding. Jurisdiction over Mr.

Albertson requiring that he, individually, undertake some specific action has not been achieved in this contested case proceeding.

A.E.G.